



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 10 1994

The Honorable Albert Gore, Jr.
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

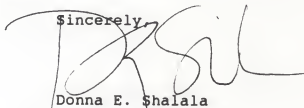
I am respectfully submitting the report required by section 4211(k) of the Omnibus Budget Reconciliation Act of 1987. Section 4211(k) directed the Secretary of the Department of Health and Human Services to report to Congress on the progress made in implementing the nursing facility (NF) staffing requirements which are mandated for nursing homes participating in the Medicaid program. This includes the number and types of nurse staffing waivers approved and the number of NFs which have received waivers. Section 1919(b)(4) of the Social Security Act enumerates staffing requirements for NFs that participate in the Medicaid program, and criteria for State approval of waivers of the nurse staffing requirements.

The report provides discussion of the legislative history of NF staffing requirements, Federal and State oversight and involvement, nurse staffing waiver criteria, and waivers granted through January 1993.

The estimated cost to prepare this report is \$75,000.

I am also sending a copy of this report to the Speaker of the House of Representatives.

Sincerely,



Donna E. Shalala

Enclosure



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAR 10 1994

The Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D.C. 20515

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REPORT TO CONGRESS

NURSING FACILITY STAFFING REQUIREMENTS

REPORTS

RA
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Donna E. Shalala
Secretary of Health and Human Services
1994

Report to Congress

Nursing Facility Staffing Requirements

Section 4211(k) of the Omnibus Budget Reconciliation Act of 1987 (OBRA 87) required the Secretary of the Department of Health and Human Services to report to Congress, by not later than January 1, 1993, on the progress made in implementing the nursing facility staffing requirements which are mandated for nursing homes participating in the Medicaid program, including the number and types of waivers approved and the number of facilities which have received waivers. The OBRA 87 mandate for this report references section 1919(b)(4) of the Social Security Act (the Act), which enumerates requirements to participate in the Medicaid program. Since there was no parallel requirement for Medicare participating facilities, including those facilities that are dually certified for both Medicaid and Medicare, this report will discuss the implementation of the nurse staffing requirements for nursing homes certified to participate only in the Medicaid program.

Legislative History

OBRA 87 added many requirements for nursing homes participating in Medicare and Medicaid. One major component was nurse staffing requirements. The House version of the bill required Medicaid nursing facilities (NFs) to have 24-hour licensed nursing services sufficient to meet the nursing needs of the residents and to have at least one registered professional nurse (RN) employed full-time; the Senate version of the bill did not address the issue. The Conference agreement required 24-hour coverage by a licensed nurse 7 days a week, and at least one RN employed 8 hours a day, 7 days a week.

State and Federal Oversight of Nursing Homes

Section 1902(a)(33)(B) of the Act requires the State Medicaid agency to contract with the State survey agency used by Medicare (if that is the agency responsible for licensing health facilities) to determine whether such facilities meet the requirements for participation in the Medicaid program found in section 1919 of the Act. The process of reviewing and determining facility compliance with the Medicaid requirements is referred to as the survey and certification process. The Health Care Financing Administration (HCFA), Department of Health and Human Services (HHS), is responsible for Federal oversight and regulation of the survey and certification process.

Background and Current Requirements for Nurse Staffing

Prior to OBRA 87, there were two categories of long term care facilities under Medicaid--skilled nursing facilities (SNFs) and intermediate care facilities (ICFs). The two categories were subject to different sets of nurse staffing requirements because SNFs were certified to provide a higher level of care than ICFs. ICFs were required to have an RN or a licensed practical or vocational nurse to supervise the health services full-time, 7 days a week, on the day shift. Standards for SNFs were more stringent. They were required to provide 24-hour services by licensed nurses, including the services of an RN at least during the day tour of duty, 7 days a week. SNFs also were required to have a director of nursing employed full-time, who was a qualified RN.

HCFA was considering changing the nurse staffing requirements for SNFs and ICFs prior to OBRA 87. Under contract with HCFA, the Institute of Medicine (IoM) issued a report in 1986 that addressed nurse staffing. IoM noted that the distinction between the two types and levels of care provided was not always clear. A patient in a SNF could improve to the point that ICF care would be sufficient, or an ICF patient could deteriorate and require SNF care. The major distinction between SNFs and ICFs was level of nurse staffing. The IoM stated that all nursing homes should employ enough licensed nurses to sufficiently supervise nurse aides at all times, since aides provide most of the care to residents. Therefore, the IoM recommended that the SNF minimum staffing requirements be applied to all nursing homes.

Based on the IoM study, HHS published a proposed regulation on October 16, 1987 (52 FR 38582), that listed requirements for participation in Medicaid and Medicare, including three alternatives for nurse staffing requirements. One would adopt the previous SNF staffing requirements. Long term care facilities certified for Medicaid would be required to have sufficient numbers of licensed nurses and other personnel on a 24-hour basis, including an RN on duty on the day shift at least 8 hours a day, 7 days a week. This would increase staffing requirements for ICFs. The second alternative would have retained the SNF requirement for SNFs and retained essentially the ICF requirements for ICFs. The third alternative was to impose the SNF requirements for both SNFs and ICF, but provide a waiver of the nurse staffing requirements for cases in which ICFs could provide appropriate nursing care to its residents at a lower level of staffing.

Section 4111(a) of OBRA 87 combined SNFs and ICFs into the single category of NFs. It was therefore necessary to ensure appropriate staffing requirements for the new provider category that would consider the differences between requirements for the previous SNFs and ICFs.

Section 4211 of OBRA 87 added section 1919(b)(4)(C)(i) to the Act, imposing nurse staffing requirements on NFs. Section 1919(b)(4)(C)(i) of the Act states that, except when waived, a NF must provide 24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents and must use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week. HHS has implemented this requirement in part through the promulgation of regulations.

On February 2, 1989 (54 FR 5316), HHS published the final regulation enumerating requirements that nursing homes must meet under OBRA 87 in order to receive Medicare and Medicaid funds. This regulation included nurse staffing requirements (found at 42 CFR 483.30), and was effective October 1, 1990. Most of those who commented on the October 16, 1987, proposed regulation agreed that it was necessary to upgrade the nurse staffing requirements from the prior ICF level to address residents' increasingly complex medical needs, while making allowances for existing nurse shortages in a manner that would not compromise resident health and safety; this was similar to HHS' third alternative for nurse staffing levels. These allowances are outlined in the statute which authorizes the States to grant nurse staffing waivers under certain conditions.

Nurse Staffing Waiver Criteria

Section 1919(b)(4)(C)(ii) of the Act authorizes a State to waive the 24-hour licensed nursing requirement, the registered professional nurse requirement, or both, if the following criteria specified in sections 1919(b)(4)(C)(ii)(I) through (V) are met:

- The facility must demonstrate to the satisfaction of the State that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;
- The State must determine that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;
- The State concludes that, for any such periods in which licensed nursing services are not available, a registered professional nurse or physician is obligated to respond immediately to telephone calls from the facility.
- The State must provide notice of the waiver to the State long-term care ombudsman and the protection and advocacy system in the State for the mentally ill and the mentally retarded; and,

- The NF must notify the residents of the facility (or, as appropriate, the guardians or legal representatives of the residents) and members of their immediate families of the waiver.

Waivers Granted

Through the end of January 1993, State Governments have granted nurse staffing waivers to 518 (9.8 percent) of the 5,302 facilities certified for Medicaid only.

Sixty-six (66) nursing facilities have been waived from the requirement to provide 24-hour licensed nursing services. Of these facilities, 2 are located in Kentucky, 6 in Minnesota, 21 in Nebraska, 1 in Ohio, 21 in Oklahoma, 8 in Oregon, and 7 in South Dakota (see Graph 1).

Much more prevalent are waivers granted to NFs from the requirement to use the services of a registered professional nurse at least 8 consecutive hours a day, 7 days a week (see Graph 2). The States have granted such waivers to 490 facilities:

Number of waivers	Percent of certified Medicaid-only NFs with waivers
Illinois-----31-----	8.0%
Indiana-----35-----	13.9
Kentucky-----2-----	22.2
Louisiana-----42-----	16.5
Minnesota-----6-----	22.2
Nebraska-----40-----	23.9
Ohio-----28-----	7.5
Oklahoma-----215-----	57.6
Oregon-----6-----	10.9
South Dakota-----7-----	9.3
Tennessee-----1-----	0.8
Texas-----69-----	10.7
Utah-----8-----	33.3

If a facility is certified to participate in both Medicaid and Medicare, the Medicare requirements apply.

Included in the 66 facilities waived from the requirement to provide 24-hour licensed nursing services and in the 490 facilities waived from the requirement to use the services of an RN at least 8 hours a day are 38 facilities with both waivers--2 in Kentucky, 4 in Minnesota, 13 in Nebraska, 13 in Oklahoma, 3 in Oregon, and 3 in South Dakota (see Graph 3). Section 1919(b)(4)(C)(ii) also authorizes the States to require NFs with waivers to use other qualified, licensed personnel. Currently, no States have such a requirement.

While Oklahoma has a disproportionately high percentage of nurse staffing waivers, the State and its facilities are continuously working to reduce the number of waivers. Prior to the enactment of OBRA 87, Oklahoma did not require 24-hour licensed nursing for ICFs. When SNFs and ICFs were combined, the ICFs did not meet the new NF staffing requirements, and 306 of the former ICFs were granted waivers. However, Oklahoma has actively sought to reduce the number of waivers. The State has encouraged community colleges to reinstitute their associate nursing degree programs, and, as required by section 1902(a)(13)(A) of the Act, Oklahoma has reduced the amount of Medicaid reimbursement to NFs with waivers. In addition, individual nursing facilities and nursing home associations give scholarships to licensed vocational nurses to become RNs as part of a work-study program.

There is variation in the way States grant both types of nurse staffing waivers. Because the Act does not specify the number of hours that can be waived, the States have latitude in the number of hours of nursing coverage that they will waive. For States that have granted waivers of the 24-hour licensed nursing requirement (168 hours per week), the degree of variation ranges from a NF not having licensed nursing 16 hours a week to not having coverage 84 hours a week. For example, a facility may be waived from having licensed nursing coverage on the weekends, or a facility may be waived from having licensed nursing coverage on the night shift 7 days a week. For States that have granted waivers of the RN coverage for 8 hours a day, 7 days a week the variation ranges from a NF not having RN coverage 16 hours a week (which is typically weekend coverage) to no RN coverage 48 hours a week. Table 1 depicts the extent of the variation. The first column lists the States that have granted waivers, the second column describes the extent of each waiver granted, and the third column lists the number of NFs in the State that has each type of waiver.

On February 5, 1992, HHS published a notice of proposed rulemaking that would give further guidance on the requirements for nurse staffing (57 FR 4516). The proposed regulation iterates the statutory criteria for facilities to receive nurse staffing waivers. HHS has received over 2,000 comments on this proposed regulation and is currently in the process of developing a final rule.

HHS Involvement

Section 1919(b)(4)(C)(ii) of the Act states that waivers granted under that section shall be subject to review by the Secretary. Of HHS' 10 regional offices (ROs), 6 oversee States which have granted waivers. The ROs review the State-granted NF waivers at least annually. RO staff review documentation submitted by the States to determine if waivers were granted appropriately. The RO with jurisdiction over Oklahoma closely monitors waiver activities in the State. Oklahoma submits monthly reports which outline the number of waivers granted and the number denied.

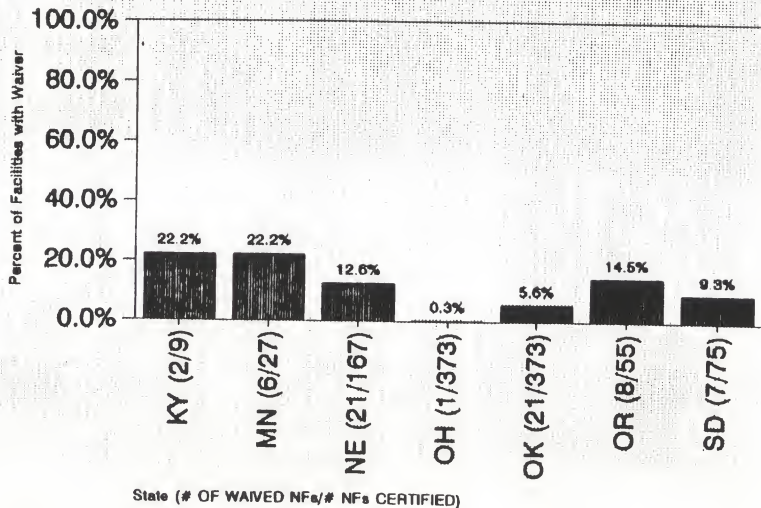
Section 1919(b)(4)(C)(iii) states that if the Secretary determines that a State has shown a clear pattern and practice of allowing waivers in the absence of diligent efforts by facilities to meet the staffing requirements, the Secretary shall assume and exercise the authority of the State to grant waivers. The February 5, 1992, proposed regulation addresses HHS' revocation of State waiver authority. To date, HHS has not assumed State authority to grant waivers to NFs. HHS is currently in the process of developing criteria for reviewing State granted waivers until the regulation is finalized.

Summary

Most nursing homes currently meet the nurse staffing requirements. Of the 5,302 certified Medicaid facilities, 9.8 percent have received waivers. Through the promulgation of regulations, and the judicious granting and monitoring of nurse staffing waivers, HHS, the States, and nursing homes nationwide are implementing the nurse staffing requirements.

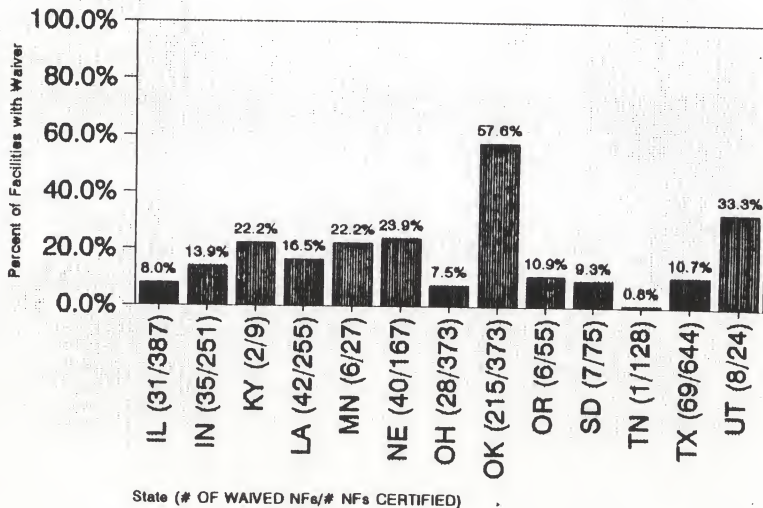
GRAPH 1

NFs WITH 24 HR LICENSED NURSING WAIVER



Graph 2

NFs with 8 Hr/7 Day Waiver



GRAPH 3

NFs WITH BOTH WAIVERS

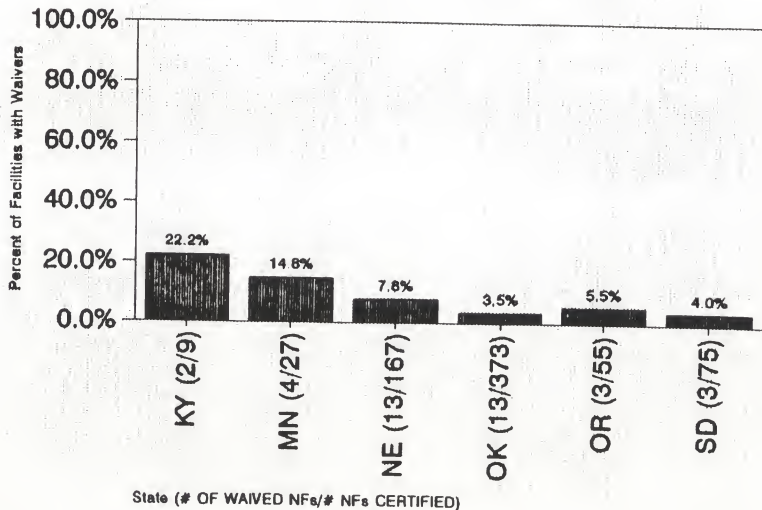


Table 1

Analysis of States with Waivers

<u>State</u>	<u>Extent of Waiver</u>	<u>No. of NFs</u>
Illinois 24 Hr lic.		0
8 Hr/7 day	Predominately one day of weekend coverage	State did not specify hours waived
Indiana 24 Hr lic.		0
8 Hr/7 day	Predominately weekend RN coverage waived	State did not specify hours waived
Kentucky 24 Hr lic.		0
8 Hr/7 day		0
Both		2
Louisiana 24 Hr lic.		0
8 Hr/7 day	Only gives waivers of RN weekend coverage; some facilities have no weekend coverage, and some have every other weekend coverage	State did not specify hours waived
Minnesota 24 Hr lic.		2
8 Hr/7 day	RN waived on weekends only	2
Both	RN waiver for weekends and additional hrs.	4

<u>State</u>	<u>Extent of Waiver</u>	<u>No. of NFs</u>
Nebraska		
24 Hr lic.	Waiver from 24-hr. licensed coverage (mostly on the night shift)	8
8 Hr/7 day	RN coverage waived 8 hrs. a week	8
	RN coverage waived 16 hrs. a week (mostly weekends)	19
Both		13
Ohio		
24 Hr lic.	Type I--Waiver of 24-hr. licensed coverage for a maximum of 56 hrs a week and only for NFs with 25 beds or less	1
8 Hr/7 day	Type II--RN waiver for NFs with 50 beds or less--waive 16 hr. a week (NFs cannot have both a Type I and Type II)	28
Oklahoma		
24 Hr lic.	Waived from 48 hrs licensed nurse coverage a week	8
8 Hr/7 day	RN on duty 40 hours a week	105
	RN on duty 8 hours a week	97
Both	RN on duty 16 hrs. a week, licensed coverage on the day shift 7 days a week,	13

<u>State</u>	<u>Extent of Waiver</u>	<u>No. of NFs</u>
	no more than 8 consecutive hrs. waived a day, and no more than 48 hrs. in any combination of waiver each week	
Oregon		
24 Hr lic.	Waived from 56 hrs a week licensed coverage	3
	Waived from 24 hrs. a week licensed coverage	1
	Waived from licensed coverage 84 hrs. a week	1
8 Hr/7 day	Waived from 16 hrs. RN coverage a week on the day shift	3
Both	Waived from both RN coverage on the day shift and licensed coverage 16 hr. a week	1
	Waived from RN coverage on the day shift 16 hrs. a week and licensed coverage 32 hrs. a week	1
	Waived from 16 hrs. of RN coverage on the day shift and 56 hrs. of licensed coverage a week	1
South Dakota		
	Hours waived are facility-specific-- facility requests waivers for individual needs	
24 Hr lic.		4
8 Hr/7 day		4

<u>State</u>	<u>Extent of Waiver</u>	<u>No. of NFs</u>
Both		3
Tennessee		
24 Hr lic.		0
8 Hr/7 day	RN waiver, weekends only	1
Texas		
24 Hr lic.		0
8 Hr/7 day		69
Utah		
24 Hr lic.		0
8 Hr/7 day	RN coverage waived; hours unavailable	3
	RN coverage waived 40 hrs. a week	1
	RN coverage waived 16 hrs. a week	3
Both	Total RN coverage waived and licensed coverage waived 16 hrs. a week	1

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